BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
2000 Biennial Regulatory	)	WT Docket No. 01-14
Review Spectrum Aggregation	)	
Limits for Commercial Mobile	)	
Radio Services	)	
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COMMENTS OF TELEPHONE AND
DATA SYSTEMS, INC.

April 13, 2001

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DATA SYSTEMS, INC.

Telephone and Data Systems, Inc. ("TDS"), on behalf of itself and its subsidiary, United States Cellular Corporation ("USCC")[1] (collectively "TDS"), hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking, released January 23, 2001, in the above-captioned rulemaking proceeding.[2]

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[1] USCC provides cellular telephone service to approximately 3.1 million customers through 145 majority-owned and/or managed cellular systems serving approximately 17% of the land area and approximately 9% of the population of the United States (approximately 25.1 million people).

[2] See In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Radio Services, WT Docket No. 01-14, Notice of Proposed Rulemaking, FCC 01-28, released January 23, 2001 ("NPRM").

Introduction and Summary

In accordance with its previous position,[3] TDS supports the retention of the FCC's "spectrum cap" now set out at Section 20.6 of the FCC's Rules. That rule is still needed, perhaps now more than ever, because it continues to foster the goals which the FCC enunciated in 1996 – namely universality of service, speed of deployment, diversity of service offerings, and competitive delivery of wireless services.[4] TDS presently believes that eliminating the spectrum cap or raising the cap to 55 MHz or above in all markets could only have the effect of diminishing the number of wireless competitors in each market, without any compensating public benefit.

The large national carriers who wish to eliminate the spectrum cap have failed thus far to demonstrate how the public will be benefited by allowing them to increase their wireless spectrum, especially in MSA markets.

TDS does believe, however, that it would be desirable to relax the related cellular cross interest rule, now set out in Section 22.942 of the Commission's Rules. At present, the cross interest rule prohibits a party which controls a cellular licensee in one market from having an interest in excess of five percent in the other cellular licensee in that market. The cross-interest rule should be amended to raise

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[3] See, e.g. TDS Comments (filed January 25, 1999) and Reply Comments (filed February 10, 1999) in WT Docket 98-205.

[4] In the Matter of Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap: Amendment of the

that limit to 20 percent and to create a "single majority shareholder" waiver procedure similar to that described at "Note 3" to the spectrum cap rule.

Discussion

I. The Commission Should Retain The Spectrum Cap Limits in Section 20.6 of its Rules

TDS supports retention of the current spectrum aggregation limits set forth in Section 20.6 of the FCC's Rules. The current rule, as modified in 1996 and 1999,[5] reflects the FCC's considered judgment as to the best means of fostering competition among wireless carriers while maintaining incentives for innovation and efficiency.

In 1999, following a careful review of its spectrum aggregation limits, the FCC modified and liberalized the spectrum cap, to permit, inter alia, the acquisition of 55 MHz of wireless spectrum in RSAs, and to allow passive investors to acquire greater non-attributable interests in CMRS carriers than had been allowed previously.

But the Commission found that maintaining the 45 MHz spectrum cap in non-rural areas was essential to the preservation of competitive opportunities for small, mid-sized and rural wireless carriers. Specifically, the Commission found

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Commission's Cellular PCS Cross Ownership Rule, WT Docket No. 96-59, Notice of Proposed Rulemaking, 15 FCC Rcd 15052 (1996).

5 See 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Report and Order 15 FCC Rcd 9219, 9223 (1999) ("First Biennial Review Order").

that the spectrum cap had contributed to the development of CMRS competition by ensuring that there would be four or more facilities-based competitors "in most areas."[6]

In the NPRM in this proceeding, the FCC succinctly and eloquently summarized the benefits to competition and the public interest which the spectrum cap had provided as of 1999:

> "In particular, we found that eliminating these regulations and enabling reconsolidation to occur could threaten reversal of the trends toward falling prices, improved service quality, product innovation, and product differentiation. In this regard, we noted the differentiated products that have been offered by multiple service providers, and cited data showing that the bundled price per minute for cellular service had declined significantly with the entry of the fourth and fifth broadband CMRS carriers into a market. We therefore rejected certain carriers' arguments that we should raise the cap (e.g. to 60 MHz) because consolidation to three competitors would not adversely affect CMRS markets, stating instead that 'significant benefits of competition are unlikely to be exhausted with the entry of a third carrier.' We also rejected similar arguments to raise the cap uniformly to 55 MHz, concluding that three carriers with 55 MHz each, with 15 MHz of spectrum for a fourth competitor, could result in a more highly concentrated and less competitive market than many CMRS markets were in 1999."

NPRM, supra at ¶ 6 (footnotes omitted).

In 1999, anticipating arguments that a relaxation of the spectrum cap would be needed to provide new and advanced wireless services, the FCC provided for

[6] First Biennial Review Order, supra, 15 FCC Rcd, at 9240.

waivers of the spectrum cap, if necessary, to provide advanced wireless services.[7] The Commission also decided in 2000 to exclude from the spectrum cap the 700 MHz frequencies newly allocated to wireless services whenever they are auctioned.[8] These decisions reflect a careful balancing of the equities and TDS supports those FCC actions.

But have the positive effects of the spectrum cap identified by the FCC in September, 1999 and cited last January in the NPRM, ceased to exist? Should the spectrum cap itself now be abolished or liberalized? We see no evidence to support such a reversal in the NPRM.

On the contrary, the evidence is that the spectrum cap continues to benefit the people of the United States by increasing intra-market wireless competition. The NPRM cites the FCC's Fifth Annual CMRS Competition Report, released in August, 2000, to report that about 88 percent of U.S. residents now live in counties served by three or more wireless carriers and 69 percent of the U.S. population now live in counties served by five or more carriers, reflecting the spectacular growth of PCS and ESMR service during the nineties.[9]

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[7] First Biennial Review Order, supra, 15 FCC Rcd, at 9255-9256.

[8] See Service Rules for the 746-764 and 776-799 MHz Band, and Revisions to Part 27 of the FCC's Rules, WT Docket No. 99-168, First Report and Order, 15 FCC Rcd 476, 497-498 (2000).

[9] See NPRM, supra, at ¶14; Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service, Fifth Report, 15 FCC Rcd 17660, 17666 (2000).

Tellingly, the main potential threat to competition which has emerged in the wireless world over the past decade has been the rise of "national" carriers, whose growth has been unconstrained by any limits on their "national" reach, such as those which regulate the cable television or television broadcast industries. In any case, as the FCC noted last year in another proceeding, the "consolidation of the CMRS mobile telephone sector continues."[10] There are now six "nationwide" wireless providers, namely AT&T Wireless, Sprint PCS, Nextel, Cingular Wireless, Verizon Wireless and VoiceStream.

And, as with all large and powerful corporate entities, their existence creates the possibility of anti-competitive abuses, which was noted by USCC and other filers representing small, mid-sized and rural carriers in the "automatic roaming" proceeding.

One bulwark against such anti-competitive abuses by the national carriers has been the flourishing of local competition. It is more difficult to impose discriminatory roaming terms on the customers of a small carrier, for example, if that carrier can obtain fairer terms from one of your competitors. Eliminating the spectrum cap would undermine that bulwark, resulting in monopolistic abuses at the local level as the number of local competitors shrinks and the power of the national carriers increases.

[10] See In the Matter of Automatic Roaming and Manual Roaming Obligations Pertaining to Commercial Mobile Service, Notice of Proposed Rulemaking, WT Docket No. 00-193, FCC 00-361 released November 1, 2000, ¶ 11.

TDS does not object to increasing spectrum limits in the context of an expansion of the total spectrum available for wireless purposes, as in the 3G proceeding. A primary purpose of new wireless allocations would be to allow existing carriers to offer new, advanced wireless services. But until there are additional wireless spectrum allocations, there is no good reason to permit national carriers to amass more spectrum locally, with all the deleterious effects on local competition such a rule change would inevitably produce.

II. The FCC Should Leave Section 22.942 in Place, But Modify it to Permit Cross Ownerships Comparable To Those Permitted Under the Spectrum Cap

As an additional safeguard for local competition, TDS also supports retention of a modified version of Section 22.942 of the FCC's Rules. TDS supports the rule as is, except that we would raise, from 5 percent to 20 percent, the ownership interest which an individual or entity controlling a cellular licensee may have in its cellular competitor. TDS would also suggest the adoption of "waiver" criteria for the cellular cross interest rule similar to that found in Note 3 to Section 20.6 of the FCC's rules. Under those criteria, which minority interests in excess of the "attribution" standards of Section 22.942 might also be approved, provided the "single majority shareholder" test and other waiver criteria of Note 3 were met and the FCC, on a case by case basis, decided that a given minority interest served the public interest.

As the FCC has noted previously, the cellular cross interest rule was adopted in 1991 when cellular carriers were the "predominant providers of mobile voice services."[11] In order to make certain that the cellular industry would remain competitive in a duopoly environment, the Commission adopted the predecessor rule to Section 22.942, by which it sought to ensure that the licensee on one frequency block should not own an interest in the other frequency block in the same market.[12]

TDS believes that there are still valid reasons to have a rule which prohibits one person from controlling both cellular licensees in the same market, regardless of what action the Commission may take with respect to the spectrum cap. First, there is no conceivable situation in which the public would be better served in a given market by having a monopoly cellular provider than by having competition in the provision of cellular service. Second, there are still cellular markets, particularly in rural areas, in which no PCS carrier has initiated service. In such markets, a prohibition on a cellular monopoly is still a valuable competitive safeguard, as it was in 1991.

The FCC should, however, recognize that there have been significant changes in the wireless market structure since 1991, namely the emergence of PCS and ESMR services in much of the country, which do justify a relaxation of Section

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[11] See In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers WT Docket No. 98-105, Notice of Proposed Rulemaking, 13 FCC Rcd 25132, 25137 (1998).

[12] Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket Nos. 90-6, 85-388, First Report and Order and Memorandum Opinion and Order On Reconsideration, FCC Rcd 6185, 6228-29 (1991).

22.942's most restrictive aspect, the rule's prohibition on a party which controls a licensee in a market from having any interest exceeding five percent, including a non-controlling interest, in the other cellular licensee in that market. That prohibition can be modified by simply raising the cross interest limit in Section 22.942(a) to 20 percent. By so doing, the FCC would raise the level of the cellular cross ownership rule "exemption" to the 20 percent spectrum cap attribution exemption set forth in the PCS rules, specifically, Section 20.6(d)(2). There is no good reason why the cellular rules should not be the same as the PCS rules in this regard.

In 1994, in adopting Section 20.6(d), the FCC established a reasonable balance between the desirable goals of free trade in CMRS interests and the preservation of intra-market competition.[13] For example, in Sections 20.6(c) and (d), the Commission decided that it would actually serve the pro-competitive purpose of the rule to permit a cellular-PCS cross-ownership of up to 20% in overlapping service areas.[14]

It would make sense now to reflect that same balance between those goals in the cellular cross interest rule. The same considerations which led the FCC in 1994 not to impose in Section 20.6 a ban or a very restrictive limit on cross-ownerships

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[13] See, In the Matter of Implementation of Section 3(n) and 332 of The Communications Act, Third Report and Order, 76 R.R. 2d 326, 381-384 (1994).

[14] In the 1999 First Biennial Review Order, supra, the Section 20.6(d)(2) and (d)(3) ownership attribution limits were increased to 40 percent for small businesses, rural telephone companies and passive investors. The attribution limit remains 20 percent for other entities.

between controlling and non-controlling interests, namely a desire to foster wireless transactions, which may involve some incidental cross-ownerships of that type, also now support a modification of Section 22.942. Moreover, if the evolution of the wireless market in the future should support a relaxation of the attribution limits of Section 20.6(d), those changes could also be reflected in Section 22.942. Such changes could be made in both rules without losing the benefits of the basic principle that both cellular and broadband PCS licensees with significantly overlapping service areas ought to be independently controlled.

Moreover, in the First Biennial Review Order, which set the 5 percent limit for the cellular cross interest rule, the FCC merely asserted, without citing any supporting evidence, that allowing a cellular licensee to hold up to a 20 percent non-controlling minority interest in its competitor "would infact pose a substantial threat to competition,"[15] while concluding that a 5 percent cellular cross interest "would [not] pose a significant threat to competition."[16]

Given that those bare statements are the only present basis for the distinction between Sections 20.6(d)(2) and 22.942(a), and given the lack of any evidence that minority cross interests of up to 20 percent would in fact pose any threat to competition, TDS believes that the two rules should be harmonized.

TDS would also suggest that the FCC should incorporating the "single majority shareholder" waiver test from Note 3 to Section 20.6 into Section 22.942.

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15 First Biennial Review Order, supra,¶73.

16 Ibid, at ¶74.

It may be that situations will arise in which a party controlling a cellular licensee may acquire a minority interest in excess of 20 percent in a competitor controlled by a single majority shareholder under circumstances in which there is no actual threat to competition.[17]

There is, we submit, also no good reason why cellular cross ownerships in such circumstances could not be analyzed in accordance with the criteria set out at Note 3 to Section 20.6 to determine if such an interest could be retained.

It might be noted that the strength of the campaign to repeal the spectrum cap also demonstrates that the 20% attribution standard and Note 3 waiver criteria of Section 20.6 evidently do work efficiently to prevent licensees from obtaining actual operating control of spectrum in excess of the spectrum cap. Thus, it should also not pose any threat to local competition to incorporate the same 20 percent attribution and Note 3 waiver standards into Section 22.942.

Conclusion

The FCC should retain its established spectrum cap limits, which have served the public interest by fostering local competition and preventing national carriers from obtaining excessive market power.

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[17] Note 3 to Section 20.6 requires a determination (1) that there is a single majority shareholder; (2) that the minority interest will not affect the local market anti-competitively; (3) that the minority interest holder is not involved in the operations of the licensee; and (4) that grant of the waiver would serve the public interest.

The FCC should also retain the cellular cross-interest rule, but modify it to allow non-controlling cross interests comparable to those permitted under the spectrum cap.

Respectfully submitted,

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